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OFFICE OF GENERAL
COUNSEL

Perkins
Coie

607 Fourteenth Street N.W.
Washington, D.C. 20005-2003
PHONE 202.628.6600
FAX 202.434.1690
www.perkinscoie.com

Judith L. Corley
Rebecca H. Gordon
Kate Sawyer Keane
PHONE (202) 628-6600
FAX (202) 434-1690
EMAIL JCorley@perkinscoie.com
RGordon@perkinscoie.com
KSKene@perkinscoie.com

November 12, 2010

BY HAND

Camilla Jackson Jones
Office of the General Counsel
Federal Election Commission
999 F Street, N.W.
Washington, D.C. 20463

Re: MURs 6078/6090/6108/6139/6142/6214

Dear Ms. Jones:

We are writing this letter on behalf of Obama for America (the "Committee") and Martin Nesbitt, as treasurer, (collectively referred to as the "Respondents") in response to the Commission's reason to believe findings in the above-referenced matters.

Although the Commission dismissed allegations that the Committee accepted prohibited contributions from foreign national and from fictitious names, the Commission's Factual and Legal Analysis states that the Committee "failed to take timely corrective action with regard to excessive contributions." See Factual and Legal Analysis at 2.

Yet, as stated in the Committee's initial responses to these matters, Respondents have acted in compliance with the Commission's requirements at all times.¹ The Committee carefully developed and implemented comprehensive vetting and compliance procedures

¹ The Factual and Legal Analysis at 7, footnote 2, states that the Committee's response to earlier MURs "was not amended to address [at least 38] supplemental complaints filed after [December 29, 2008]." On January 9, 2009, a lawyer at Perkins Coie spoke to Kim Collins in the General Counsel's Office about the supplemental complaints. Ms. Collins told Perkins Coie that the Committee needed only to respond to the first complaint received (dated 12/11/08) and did not need to respond to the specific allegations in the subsequent complaints received (at that time dated 12/15/08, 12/22/08 and 1/6/09). Accordingly, the Committee did not submit amendments to its response to the original complaint.

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to ensure that it did not knowingly solicit, accept, or receive prohibited contributions. Pursuant to this system, and consistent with the Commission's regulations, campaign staff and outside vendors were responsible for examining all contributions to the Committee once they were received – whether online, through direct mail, in person, or otherwise – for “evidence of illegality and for ascertaining whether contributions received, when aggregated with other contributions from the same contributor, exceed[ed]” federal contribution limits. 11 C.F.R. § 103.3(b). Any contributions made to the Committee that were found to be excessive were refunded, expunged, or redistributed. Neither the Complaints nor the Commission's Factual and Legal Analysis present any evidence to suggest that Respondents have ever knowingly solicited, accepted, or received excessive contributions.

The Factual and Legal Analysis at 9 states that in its response to the various complaints, the Committee “fails to explain how, despite [its compliance] system, many excessive contributions were apparently left unresolved.” The Committee is submitting with this written response three electronic charts which address each contribution identified by the Factual and Legal Analysis (in Chart A at 8) as excessive. The charts are described in greater detail below but, in summary here, the charts are:

- 1) A Master Chart listing each of the contributions identified by the Commission as possible excessive donations with an explanation of the status of each.
- 2) A Primary-After-Primary Chart listing the contributions identified by the Commission as designated for the primary election, but repeated after the primary period. With very few exceptions, these contributions were, in fact, received before the end of the primary period and correctly designated for the primary election..
- 3) An Excessives Chart listing those contributions found by the Committee to be excessive, together with an explanation of why the contributions were not caught by the Committee's compliance process.

As you will see from the documentation, out of more than \$745 million in contributions received by the Committee during the 2008 presidential campaign, the total amount of excessive contributions that have not yet been refunded or otherwise cured is \$337,658.54 – just .045 percent of all contributions. Given the unprecedented volume of contributions the Committee raised during the campaign, the excessive contributions that

were not refunded or otherwise cured in a timely fashion are "*de minimis* both in terms of dollar amount and as a percentage of QFA's overall receipts." Factual and Legal Analysis at 2.

Accordingly, the Commission should use the same methodology it used when dismissing allegations that Respondents violated 2 U.S.C. §§ 441e and 441f, and dismiss any allegations that Respondents may have violated 2 U.S.C. § 441a(f).

FACTUAL AND LEGAL ANALYSIS

A. Comprehensive Compliance Procedures

The Committee's comprehensive compliance procedures included an extensive back-end process to ensure it caught and redesignated, reattributed, or refunded any excessive or otherwise unlawful contributions. At regular intervals, its data management vendor, Synetech, conducted automated searches of its donor database – including all contributions, whether raised online or not – to identify any excessive donations. Contributions from repeat donors were examined to ensure that the total amount received from a single donor did not exceed the contribution limits. When contributions were entered into the Committee's Synetech database that required a redesignation or reattribution, a notation would be made in the donor's record; appropriate letters regarding redesignations or reattributions were mailed on a weekly basis.

At the end of each month, Synetech would generate a list of any possible excessive contributions and send a spreadsheet of those contributions to the Committee. After confirming that the contributions were, in fact, excessive and that they had not previously been refunded, redesignated, or reattributed, the Committee would process refund checks for each excessive contribution and then send an updated spreadsheet back to Synetech with the date of refund for each contribution.

When the Committee received Requests for Additional Information (RFAs) from the Commission indicating excessive contributions, Committee staff members would review and research the list of contributors and verify the status of each contribution. The Committee routinely amended its reports to include memo texts detailing refunds that were processed during the same or the following period, any missing reattributions or redesignations, and chargebacks that would clear any excessive contributions.

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In addition to searching specifically for excessive contributions, the Committee required Synetech to perform automated searches on a daily basis to locate any duplicate donor entries. The initial automated search would merge donor entries on the basis of matching name and email/phone/unique part of address. Synetech would also search the database manually and match duplicate donor entries on the basis of name, parts of name, and address or parts of address, city, state, zip code, or phone. The manual process was performed at least weekly and more frequently where possible. Once the duplicate records were merged, the Committee would refund, redesignate, or reconstitute any excessive contributions.

B. Resolution of Excessive Contributions

The Committee's compliance procedures were extraordinarily successful. During the 2008 election cycle, it raised over \$745 million from over 3.9 million contributors. Despite the unprecedented volume of contributions, just .045 percent of that total — \$337,658.54 from 298 donors — is comprised of excessive contributions that have not yet been refunded or otherwise cured. As detailed below, this amount is also far less than the \$1.89 to \$3.5 million range cited in the Commission's Factual and Legal Analysis. See Factual and Legal Analysis at 7-8.

The Committee reviewed each of the more than 13,000 lines of data identified by the Commission as representing possible excessive contributions. It compiled a master spreadsheet of this data, including information such as each donor's address, name of employer, and occupation; the date and amount of each contribution; whether each contribution was designated for the primary or general election; and the current status of each contribution. See Master Chart.² As indicated on the Master Chart, the vast majority of these contributions were either not excessive or have already been redesignated, reconstituted, or refunded.

² On the chart, note that there are multiple entries of the same contributions. This Master Chart is a merged version of the various charts the Office of General Counsel provided to us in electronic form. When the FEC's charts were all merged, each time a contribution was referenced — the original donation and then any subsequent reported activity such as a redesignation or refund — the chart pulled in all of the previous transactions again. So when the chart shows a redesignation, it also shows the original contribution that had previously been listed in the chart. To re-sort all of these duplicate transactions would have taken longer than the time we had to prepare this response. As a result, it is important in looking at the Master Chart, that you reference the date and amount of the contribution as well as the report it is shown on to ensure that a contribution is not counted more than once.

Included in the possible excessive contributions identified by the Commission in its Factual and Legal Analysis (in Chart A at 8) were contributions that were designated for the 2008 primary election but reportedly received after the date of President Obama's nomination. However, as suggested in footnote 3 of the Factual and Legal Analysis, the overwhelming majority of these "Primary-after-Primary contributions" were actually received by the joint fundraising committee *before* President Obama accepted his party's nomination, "but the reported 'contribution date' was the date the funds were transferred" from the joint fundraising committee to the Committee.³ As detailed in the Primary-after-Primary Chart, although \$3,973 of the "primary-after-primary" identified by the Commission were designated to the primary in error, \$1,928,255.50 of the primary-after-primary contributions were received by the Obama Victory Fund on or before President Obama's nomination on August 28, 2008. These contributions were properly designated for the primary election and should not have been included by the Commission when calculating the total amount of possible excessive contributions.⁴

The third spreadsheet attached, Excessives Chart, lists the remaining excessive contributions that have not yet been refunded or otherwise cured, together with an explanation of why they were not previously corrected. Most of these excessive contributions were due to duplicate database entries that were not identified by the Committee's initial automated or manual searches. For example, if an individual used a residential address when making her first contribution, but a business address when making her second contribution, the database may not have recognized that the contributions were made by the same individual and therefore would not have identified the second contribution as being excessive. Multiple contributions from the same individual also may not have been recognized as being excessive if the individual's name was spelled differently in one or more of the corresponding database entries. Nonetheless, it should be noted that the overwhelming majority of duplicate database entries were detected by the Committee's initial automated and manual searches, and any excessive contributions resulting from the duplicate entries were appropriately refunded, redesignated, or reattributed.

The excessive contributions listed in the Excessives Chart spreadsheet total \$337,658.54. These contributions represent less than 1/20th of one percent of the total contributions

³ The Committee further notes that it correctly reported contributions from the joint fundraising committee as of the date that the contributions were transferred to the Committee, and had not previously been informed by the Commission that it was reporting these contributions incorrectly.

⁴ Even if these contributions had been designated to the general election, it appears that the majority of them still would not have been excessive.

received by the Committee during the 2008 election cycle. And they are the *only* remaining contributions that have not yet been refunded or otherwise cured. Each of these contributions will be refunded by the Committee, and the Committee will make any necessary amendments to its reports.

C. Dismissal Required When Scope and Amount of Potential Violation is Minimal

In dismissing allegations that the Committee had accepted prohibited contributions from foreign nationals and from fictitious names, the Commission stated in its Factual and Legal Analysis that the allegations "appear to involve sums that are *de minimis* both in terms of dollar amount and as a percentage of OFA's overall receipts." See Factual and Legal Analysis at 2. With respect to allegations related to contributions from foreign nationals, the Commission reviewed only a sample of contributions received by the Committee during the 2008 election cycle and concluded that the allegations should be dismissed because "the potential Section 441e violations are limited in scope and amount." See Factual and Legal Analysis at 18. Similarly, the Commission stated that it had dismissed allegations against Hillary Clinton for President in MUR 5850 where the "amount in potential prohibited contributions was minimal ... compared to total contributions received." See *id.*

With respect to allegations related to contributions from fictitious names, the Commission also reviewed only a sample of the Committee's contributions from the 2008 election cycle and determined that the allegations should be dismissed both because of the limited "scope and amount of the contributions the Committee received from allegedly unknown persons" and because "the majority (approximately 75%) of the prohibited contributions received from the fictitious individuals cited in the complaint and identified through the Commission's review have been refunded." See Factual and Legal Analysis at 23. Of the almost \$74 million in contributions that the Commission reviewed, \$69,472 – approximately .08 percent – were from contributors with potentially fictitious names and \$15,676 of those contributions – approximately .02 percent – had not yet been refunded.

After completing a comprehensive review of not just a sample, but *all* of the Committee's contributions, the Commission found that a similarly minute percentage of contributions may have been excessive, but had not yet been refunded. But in calculating the total number of possible excessive contributions, it included close to \$2 million in

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contributions that admittedly were *not* excessive, but were suspected by the Commission as having been designated to the primary election in error. Even so, at most the amount of possible "excessive" contributions identified by the Commission was less than .5 percent of the total amount of contributions received by the Committee during the 2008 election cycle. Yet rather than following its own precedent, or applying the same methodology that it relied upon to dismiss allegations related to other prohibited contributions in the same matter, the Commission acknowledged that the amount of unresolved excessive contributions was less than .5 percent of total contributions received, but refused to dismiss the excessive contribution violations because of the "substantial amount in potential violation." See Factual and Legal Analysis at 9-10.

After completing its own thorough review of the contributions identified by the Commission as being excessive, the Committee has determined that the unresolved excessive contributions actually amount to just .045 percent of total contributions received – far less than the .5 percent referred to in the Factual and Legal Analysis. With the remaining excessive contributions totaling less than 1/20 of one percent, the Commission therefore must apply to the remaining allegations the same methodology that it applied when dismissing the allegations related to contributions from foreign nationals and fictitious names. Because the remaining excessive contributions "involve sums that are *de minimis* both in terms of dollar amount and as a percentage of OFA's overall receipts," the Commission should dismiss the allegations related to excessive contributions immediately and take no further action.⁵

Very truly yours,



Judith L. Corley
Rebecca H. Gordon
Kate Sawyer Keane

⁵ As part of this Matter Under Review, the Commission authorized an audit of the Committee under 2 USC § 437g. The Committee received a notice from the Audit Division this week regarding the start of the field work in this audit. The Committee is seeking a delay in the start of any work on the audit until after the Commission has acted on this response. Our argument support dismissal of the MUR, which would make the audit unnecessary. It is pointless to put the Committee through the work and expense of an audit when the MUR may be dismissed.

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